No. 13,139

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL NO. 7, AFL,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL NO. 7, AFL.

L. PRESLEY GILL,
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SUPPLEMENTAL STATEMENT OF THE CASE.

A. THE CHARGE OF UNFAIR LABOR PRACTICES.

1. Charge by Uhro A. Kangas.

Kangas filed a charge alleging the commission of unfair labor practices against himself, Alfred J. Vollan and LeRoy D. Lucy in these words:

> "The above named labor organization, by its officers, agents and employees, has caused the Charles R. Brower Co. to terminate the employment and/or refuse further employment to the following persons in violation of Section 8(a)(3) of the Act: Uhro A. Kangas, Alfred J. Vollan and LeRoy D. Lucy."

This charge is set out in full in the printed record beginning at page 3, and the above quoted allegation is on page 4. It was admitted in evidence as General Counsel's Exhibit 1-E.

The Charge was not included in the subject matter of the Consolidated Complaint. It was omitted from the title and from the preamble of the Consolidated Complaint. (R 10, 11.)

At the hearing before the Trial Examiner Wilson, the General Counsel moved to amend the title of the case and amend the preamble of the Consolidated Complaint by inserting the name of Uhro A. Kangas, over the objection of the Respondent. (See note and printed Record page 20.)

2. Absence of Charges by Alfred Vollan and LeRoy Lucy.

There were no charges filed by Alfred Vollan or LeRoy Lucy. Although they were alleged to have been subjected to discrimination in the Charge of Kangas, yet they were not included in the Consolidated Complaint in the title or in the preamble. (R 10 and 11.) The General Counsel moved to amend the title and the preamble to include the name of Kangas and the

amendment was allowed over the Respondent's objection. (R 20, Notes [1] and [2].)

The General Counsel never moved to include the names of Alfred Vollan or LeRoy Lucy in the title or the preamble, nor was there any notice to the Respondents at any time that Vollan or Lucy were to be the subjects of a request for re-instatement, back wages, or any other form of relief or remedy.

Although Vollan and Lucy were called as witnesses by the General Counsel, there was no notice to Respondents that they were called as witnesses on their own behalf or that other witnesses were testifying in support of any unfair labor practice against them.

Respondent supposed that Vollan and Lucy were testifying in support of the other four (4) charging individuals and objected. This subject is discussed thoroughly below in paragraph II "Improper Inclusion of Vollan and Lucy".

The Board in its Decision and Order has directed the Respondent to withdraw objection to the employment of Vollan and Lucy and to pay them back wages as follows (R. 50):

> "2. Take the following affirmative action which the Board finds will effectuate the policies of the act:
>
> (b) Notify Seattle Construction Council and its member, including Chas. R. Brower & Co., in writing, and furnish copies of said notice to the individuals involved, that it withdraws its objections to the employment of Sidney A. Lennox,

Toive E. Eskola, Uhro A. Kangas, Alfred Vollan, LeRoy Lucy, and Marvin N. Rosand, and that it has no objection to the employment of said individuals.

(c) Make whole the said Sidney A. Lennox, Toive E. Eskola, Uhro A. Kangas, Alfred Vollan, LeRoy Lucy, and Marvin N. Rosand, for any loss of pay that each may have suffered by reason of the Respondent's discrimination against him, in the manner provided herein and in the section of the Intermediate Report entitled 'The Remedy'. ''

B. THE CONTRACT CONTINUED IN EFFECT.

The Labor Agreement originally executed on June 30, 1943, was never opened up for negotiations. Elton Hickok was the Manager of the Seattle Chapter of the Associated General Contractors and the Seattle Construction Council, the latter being the employer signatory to the Agreement. He handled negotiations. (R 65.)

The pertinent provisions of the Agreement are (R 66 to 71):

''General Counsel's Exhibit No. 2
Agreement

''1. This Agreement, made in duplicate this 30th day of June, 1943, by Seattle Construction Council, acting collectively and severally for all of its members, employers of craftsmen and labor, Party of the First Part, and Seattle, Washington, Building and Construction Trades Council,

Party of the Second Part, acting collectively and severally for all their members.

* * * * * * *

"4. To determine the wage scales for the Building Trades from January 1, 1944, and each calendar year thereafter to and including January 1, 1947, it is hereby agreed that we follow the following plan:"

(Here follows a complicated method of applying the changes in the Cost of Living Index to increase or decrease the wage scales, and the effective dates thereof.)

"Paragraph 4 of this contract shall remain in effect until January 1, 1948, unless notice is given (testimony of Elton Hickok) 90 days prior to July 1, 1947, and shall renew itself from year to year thereafter, provided that wages shall be adjusted from time to time as provided for in Paragraph 4.

"All other conditions of this Agreement shall take effect on July 1, 1943, and continue in effect thereafter from year to year until changed by the mutual agreement of the parties as provided herein. *Proposed changes or modification of this Agreement shall be made by either party giving notice thereof in writing to the other party at least 90 days before July 1, and such notice* shall specify the provisions desired to be changed and shall state the time and place at which negotiations may commence. The other party shall enter into negotiations not later than 30 days from the date of the receipt of said notice, after party has notified the other in writing of proposed modifications

and changes in Agreement. *In the event no accord can be reached in the succeeding 60 days, arbitration as provided hereinafter shall be resorted to.*

"5. It is mutually agreed by the parties hereto that an Adjustment Board shall be established consisting of six (6) members to be selected by the party of the first part, and six (6) members to be selected by the party of the second part, and an equal vote to be had on all questions, three (3) from each side consisting a quorum.

"5 (a) Said Adjustment Board shall meet within forty-eight (48) hours on written request by either party to this Agreement.

"6. It Is Further Agreed by both parties hereto that all disputes and grievances that cannot be speedily and amicably adjusted on the work shall be submitted to the accredited agents of the parties hereto, and if not adjusted by them shall be submitted to the Adjustment Board, whose decision shall be submitted in writing and be final and binding upon both parties. Pending such decision there shall be no strike or lockout, except that where non-Union men are employed the Party of the Second Part reserves the right to remove all Union men from the job. In the event the Adjustment Board shall be unable to reach an Agreement, the U. S. Department of Conciliation shall be given the opportunity to adjust the difficulty in a manner acceptable to both parties signatory hereto. If such adjustment cannot be reached both parties and the U. S. Department of Conciliation shall each appoint an umpire and their decision shall be final and binding upon both parties. The Umpire appointed by the U. S. Department of

Conciliation to be satisfactory to both parties hereto."

* * * * * * *

"8. Wage Scale: It is further agreed that the following wage scale is accepted and approved by both parties and shall continue during the life of this Agreement unless changed under the provisions of Section 4. The classifications of employment and the wage scales applying thereto shall be in accordance with Schedule 'A', attached hereto. Additions for the purpose of clarification or supplying omissions may be made from time to time by agreement between the interested parties hereto."

While the Escalator Clause functioned automatically, a re-drafting of the clause could be effected by the giving of a 90-day notice prior to July 1st of any year.

However, a proposed change in this clause would be negotiated and if no accord could be reached on the proposed changes, the dispute would be arbitrated. (See last sentence of Paragraph 4 above.)

The Trial Examiner in his Intermediate Report decided that the arbitration clause did not apply to a reopening of the Escalator Clause in Paragraph 4.

Intermediate Report, Conclusions (R 34):

"However, the Respondent argues that the cases cited for the proposition above are inapplicable here for the reason that this contract provides for arbitration in the event that the parties to the contract should be unable to agree upon the requested changes in conditions of employment after

60 days of negotiations, that this arbitration decision is final and binding on both parties and, therefore, the contract here is made perpetual by reasons of its arbitration features, while in the cases above cited there were no similar arbitration features and thus automatically ceased to exist at the end of the anniversary period in the event of an unsettled state of negotiations. Unfortunately for the Respondent's contention here there is no such arbitration feature connected with the escalator wage scale provisions of the present contract, although changes could be demanded therein by notice given 90 days prior to the date of July 1. Thus, an essential feature of this contract would expire in the event of an unsettled dispute over changes therein."

However, the Board in its Decision and Order disagreed (R 46):

"The Respondent contended that the contract, entered into before the effective date of the 1947 amendments, was not renewed thereafter and that the validity of the contract was thus preserved by Section 102 of the Act. In making this contention, the Respondent urges that certain so-called arbitration provisions of the contract make it one of perpetual duration and thus this case is distinguishable from others in which the Board has held that a contract was renewed within the meaning of Section 102. In rejecting this contention, the Trial Examiner construed the contract so as to make the so-called arbitration provisions inapplicable to Paragraph 4 of the contract which provides that its wage provisions 'shall remain in effect until January 1, 1948, unless notice is given 90 days

prior to July 1, 1947, and shall renew itself from year to year thereafter * * *'. We do not so construe the contract."

Hickok, Manager of the Employer, signatory to the Agreement testified that neither the escalator clause (paragraph 4 of General Counsel's Exhibit No. 2) nor any other provision of the Agreement was opened up for negotiations at any time. This testimony does not appear in the printed record and is set forth below (Tr. 25, line 18):

"Q. And since you have been Manager have you participated in any negotiations with labor unions?

A. We have—due to the type of contract we have, it hasn't been necessary for any labor negotiations."

ARGUMENT.

I.

IMPROPER INCLUSION OF KANGAS, VOLLAN AND LUCY.

Uhro A. Kangas filed a charge against the Respondent. His name was omitted from the title of the Consolidated Complaint and omitted from the preamble of the Consolidated Complaint.

When charges are filed, it is customary for the Regional Director with whom they are filed to immediately send a copy to the person or organization which is alleged therein as having committed the alleged unfair labor practices. It is also customary for the Regional Director to request an answer to the charges.

The Regional Director (or the General Counsel of the Board) makes an investigation and if there is merit in the charges the Regional Director issues a complaint. To the complaint is attached a copy of the charge on which the complaint is issued. The Respondent can assume with respect to any charges which are not included in the complaint, that the charges have been found to be without merit.

The Charge of Kangas was filed as 19-CB-97. It was not attached to the Consolidated Complaint, nor was his name listed in the title or in the preamble.

When the hearing was opened before Trial Examiner Wilson, the General Counsel included the Charge of Kangas, 19-CB-97, as part of the Board's file and it was marked and received in evidence as Board's Exhibit 1-g. The Affidavit of Service of the Charge is Board's Exhibit 1-h. (Transcript 6.)

The General Counsel moved to amend the title and the preamble of the Complaint. The printed record does not set forth the motion or the objection. Since Respondent's additions to the printed record are few, it is convenient to except the testimony here. The General Counsel moved to amend (Transcript 8):

> "Mr. Tillman. In connection with the original Charge in 19-CB-97, which I mentioned was inadvertently not attached to the Complaint, it was also not—I might say the Complaint also was not in conformity with the original Charge insofar as the caption fails to set forth the name of the charging party. Therefore, I would move to amend the caption of the case, on the lines where appears

the name, Marvin N. Rosand, by adding before that name the words, 'Uhro A. Kangas,' and making it read then on that line, 'Uhro A. Kangas and Marvin N. Rosand.'

Then, I also move to substitute for the words on that same line, 'an individual' the word, 'individuals'."

To which Respondent objected (Transcript 9):

"Mr. Gill. We object to the motion to amend. We have in mind the title lists three persons as to whom—allegedly their rights had been impaired. In the Complaint, in addition to those, there are three other individuals listed, one of whom is this Mr. Kangas, and I move to strike the reference to those three other persons. I think it is untimely at this time to start off with the Complaint based on alleged discriminations against three people, and then go and add a fourth. There is a possibility of adding two more if counsel's theory is correct, and I think it is prejudicial to our rights."

The Respondent repeated its objection and inquired whether the General Counsel had any plan to adding, in addition to Kangas, the other persons mentioned in the Kangas Charge, Vollan and Lucy. The General Counsel stated that he only wanted to add Kangas and not Vollan or Lucy (Transcript p. 10):

"Mr. Gill. I am certain it is a surprise. We came here prepared for the three individuals listed in the caption as the ones discriminated against, and now a fourth has been added, and if their theory is correct, we will be confronted with two more.

Trial Examiner Wilson. You have read the complaint?

Mr. Gill. Yes, we read the Complaint, and this portion on Mr. Kangas is immaterial. The fact that Mr. Kangas has been discriminated against is no proof we discriminated against Vollan and Rosand (Lucy), and I have a Motion to Strike that complaint. Counsel hasn't explained yet why he wanted one added, Mr. Kangas, and still omits the two others.

Mr. Tillman. I have explained it in this sense —the original Charge in 97 was filed by one man, but he named himself and two or three others as the discriminatees. Therefore, to make the formal papers read accurately, I should like his name included as one of the charging parties."

At Transcript page 11:

"Trial Examiner Wilson. And you contend you are surprised, Mr. Gill?

Mr. Gill. Surprised on this basis. We have a Motion to Strike the three, and it is basically sound, legally, that any proof of discrimination against Kangas would not be proof of discrimination on the issues of the case as to Vollan and Rosand (Lucy), and the Charge I have here next to our copy, the service copy for Rosand, doesn't mention Kangas in any way in the Charge. We have had no notice of the Charge as to proceeding to a hearing on Kangas except just a moment ago.

Trial Examiner Wilson. You mean to tell me you are not prepared to go ahead and defend the case against Kangas?

Mr. Gill. If you will grant a recess—if that is the basis of your line of thinking—I will inquire

of my people. If it is possible that I can have a short recess and make inquiry. I want to be fair about it on that issue.

Trial Examiner Wilson. Well, Mr. Gill, as the names are all mentioned here in various and sundry paragraphs, including paragraph 16, I am not quite prepared to see how you have been taken by surprise. I will deny this motion, Mr. Gill. Do you want to be heard on your motion to strike and your motion to dismiss?"

The Trial Examiner did not allow the Respondent a recess to consider whether we were prepared to defend against Kangas, and allowed the motion to include Kangas.

Later Respondent moved to strike the testimony of Kangas (Transcript 79):

"Mr. Gill. Mr. Trial Examiner, in order to preserve my rights, I move to strike all of the testimony of the last preceding witness, Mr. Kangas, on the ground that he was not included in the title of the case as one of the persons who had allegedly been discriminated against.

Trial Examiner Wilson. I will deny that and allow the testimony to stand. I want to preserve my record, Mr. Gill."

Vollan was called as a witness by the General Counsel. (Transcript page 79.) Respondent mistakenly thought the witness was Rosand and when apprised that his name was Vollan, the Respondent moved to strike his testimony (Tr. 83):

"Q. (by Mr. Gill). Your first job was a shipyard job, was it, Mr. Rosand?

A. It isn't Rosand, it is Vollan.
Q. Pardon?
A. It isn't Rosand. It is Vollan.
Mr. Tillman. V-O-L-L-A-N.
Mr. Gill. I am sorry. I move to strike all of this witness' testimony.
Trial Examiner Wilson. Same ruling on that, Mr. Gill.
Mr. Gill. And on the additional ground that any discrimination against Vollan is not proof that the other persons were discriminated against.
Trial Examiner Wilson. Well, Vollan is one of the three in this case, isn't he?
Mr. Gill. No, he isn't.
Trial Examiner Wilson. You mean he is not—he is just not mentioned in the title?
Mr. Gill. Yes.
Trial Examiner Wilson. He is mentioned in the body of the complaint?
Mr. Gill. Yes.
Trial Examiner Wilson. I will over-rule the motion—deny the motion."

It was then obvious that Vollan and Lucy were not being called as witnesses in their own behalf, but as witnesses in support of the four (4) charging individuals. Respondent objected to the testimony of Lucy (Transcript 89):

"Mr. Gill. I move to have this witness excused on the basis that he is not named in the title of the case as being a party, and that any evidence that this witness may offer as to any alleged discrimination affecting him is not any proof that other persons were discriminated against.
Trial Examiner Wilson. Denied."

The objection to Vollan was repeated (Transcript 93):

Cross-Examination.

"Mr. Gill. In this cross-examination I am not waiving the motion——

Trial Examiner Wilson. No, you are not.

Mr. Gill. ——to excuse the witness. It is now a motion to strike his testimony."

The motions were renewed at the close of the hearing (Transcript 162):

"Mr. Tillman. I am resting. I would like to make my usual motions to conform the pleadings to the proof as to such matters as names, dates, places, and other minor details.

Trial Examiner Wilson. You are not attempting to change your cause of action?

Mr. Tillman. No.

Trial Examiner Wilson. Merely typographical errors and minor discrepancies.

Mr. Gill. If it over-rules any of my objections I object and I don't want his pleadings amended to correct the defect.

Trial Examiner Wilson. They won't be amended in any such way as that, Mr. Gill. Mr. Gill apparently has rested. Everybody seems to be satisfied.

In due course, the Trial Examiner will prepare and file with the Board his Intermediate Report and recommended order in this proceeding, and will cause a copy thereof to be served upon each of the parties.

By the way, did you want to renew your motions, too, I suppose, Mr. Gill?

Mr. Gill. Yes."

This case was tried on the basis that Kangas was made a party, over Respondent's objections and that Vollan and Lucy were not parties.

Nevertheless the Trial Examiner Wilson included Vollan and Lucy as parties and recommended for them the same relief as was given to the four (4) charging individuals. Discrimination was found to exist as to all six. (R 36.) The proposed Remedy included a cease and desist and back wages (R 37, 38) for all six (6). The Recommendation provided in "(b)" for no objection to the employment of the six. (R 40.) Payment of Back wages was Recommended. (R 40.) Provision for posting of the Notice was required and it enumerated the six persons. (R 43.)

The Board adopted the proposed Remedy and Recommendation of the Trial Examiner and ordered the payment of back wages for all six persons (R 48), and cease and desist for all six. (R 50.)

The Respondent asserts error in the inclusion of Kangas, Vollan and Lucy as violating the Due Process Clause of Fifth Amendment of the Constitution of the United States.

II.

THE CONTRACT CONTINUED IN EFFECT.

Respondent asserts that the contract was not renewed nor extended within the meaning of Section 102, but that it continued in effect. Hickok, the principal officer of the employer-association, testified that no provision of the contract has been opened for negotia-

tion. This appears from the printed Record and is set out by Respondent in the Supplemental Statement of the Cases, Item "B".

The Consolidated Complaint, paragraph XI (R 14) alleged that the contract (R 14; General Counsel's Exhibit 1-L) "has been renewed from year to year both before and after the effective date of the Act * * *"

This was denied in Respondent's Answer Paragraph III. (R 18.)

The Trial Examiner found that the parties had taken no affirmative action to open the contract, but that the parties had by remaining silent, mute and inactive permitted the contract to be renewed and extended with the same effect as if they had affirmatively re-opened it, thereafter re-negotiated it, and concluded with re-execution. (R 34.)

Respondent anticipated this ruling and the cases that it would be based upon, and sought to distinguish the facts by asserting the arbitration clause "In the event no accord can be reached in the succeeding 60 days, arbitration as provided hereafter shall be resorted to" (R 69; General Counsel's Exhibit No. 2, last sentence of paragraph 4), distinguished the facts. We contended that the arbitration clause referred to disputes relative to a re-opening of the Wage Escalator Clause (paragraph 4) as well as to disputes arising from re-opening other provisions of the Agreement.

The Trial Examiner ruled that the arbitration clause did not apply to a re-opening of the Wage Escalator Clause.

Our position was that previous Board decisions were distinguishable on the basis that in those cases on a re-opening of the contract, either party could prevent the renewal of the contract and prevent the extension of a new contract, while in the instant case, although either party could re-open the contract, any dispute would be resolved in arbitration. Therefore, we concluded that contractual relations would continue *ad infinitum* and neither party could prevent a renewal or extension of the contract. We, therefore, felt the contract was within Section 102 of the Act.

The Board reversed the Trial Examiner and held that the arbitration clause was applicable to all provisions of the contract, but the Board reached the same result by holding that the contract was renewed and extended because the arbitration clause was immaterial. (R 47.) Petitioner's Brief concedes this (footnote p. 18):

> "The Board held in accordance with the Union's contention that all provisions of the agreement were subject to settlement by arbitration. (R. 46, 47.)"

We have set out in our Supplemental Statement excerpts from the Intermediate Report, the Board's decisions and the Contract.

We consider this court's decision in the case of *NLRB v. Clara-Val Packing Co.,* 191 F. (2d) 556, C.C.A. 9, decided August 30, 1951, to be decisive of the issue that the contract herein involved was the type of contract that Congress intended to exclude in Section 102 of the amended Act.

In that case, the Union learned that its member Stiers after performing work at the Clara-Val plant of the Respondent-employer went to the plant of Driscoll Strawberries, Inc. and performed work. The Driscoll plant was being picketed by the Respondent-union, and the union demanded the discharge of Stiers at the Clara-Val plant. She was discharged under the union security provision of the contract between the Respondents.

Pursuant to Charges, the NLRB ordered her reinstatement, and petitioned this court for an order of enforcement.

The duration clause provided (page 558):

"Section XV Term of Agreement.

(a) The exclusive collective bargaining relationship provided by this Agreement and effective from and after March 1, 1947, shall *continue* expiration date until:

1. Terminated by written notice served by either party upon the other as provided in Paragraph (a) Section XII or in Paragraph (b) of this section, or

2. Terminated by written notice served by either party upon the other as provided in Section XVI (b) 2.

(b) The anniversary date of this Agreement shall be March 1st of each year. If either party desires to terminate the exclusive collective bargaining relationship and this Agreement on any anniversary date, written notice to such effect shall be served between February 16th and March 1st of the year then current.

Section XVI, Procedure for Modification.

(a) In the event either party desires to modify any of the terms of this Agreement or to establish new or different terms or conditions, written notice specifying in exact language the changes desired shall be served within the sixteen (16) day period December 16th to December 31st inclusive. The months of January and February following service of the above notice shall be devoted to negotiations and if the parties are in complete agreement all changes mutually agreed upon shall become effective on March 1st and *shall remain effective* for *not less* than twelve (12) months thereafter.

(b) If any of the matters under negotiation are still in dispute on March 1st, either of the following actions may be taken:

1. The parties may mutually agree upon an additional period or periods of negotiation and the changes finally agreed upon shall become effective on a mutually acceptable date and *shall remain effective* until *at least* the following March 1st.

2. Either party by written notice on or *after March 1st may terminate* the collective bargaining relationship and this Agreement.

(c) If during the December 16th to December 31st period, neither party serves notice of a desire to modify any of the terms of this Agreement or to establish new or different terms or conditions, then this Agreement *shall continue* for an additional period of *at least* twelve (12) months after the next March 1st anniversary date."

The emphasis was supplied by the court.

This court considered the legislative history of Section 102 of the amended Act and held that the House Bill 3020 contained similar language except the last clause *"unless such agreement was renewed or extended subsequent thereto."* (Emphasis supplied.)

Then the court stated on page 558:

> "It was in the conference committee of the two houses that Section 102 attained its present form. Obviously, the extended language of that section as adopted contemplated that the relationship between the parties here was not to be disturbed any more than if the instant agreement had been for a definite term of five years."

This court concluded (page 559):

> "(2) An agreement which 'shall continue without expiration date' until terminated or modified by the act of the parties within a fixed period from its anniversary date is not terminated on its anniversary where the parties take no action. It continues. It is not renewed. Where no such action is taken the agreement necessarily must 'continue for an additional period of at least twelve months after the next March 1st anniversary date.' "

In the instant case, the facts of contractual perpetuity are much stronger. In the *Clara-Val* case, the contract specifically provided that neither party could terminate the contractual relationship if the parties pursuant to a re-opening of the contract were not able to agree on a new agreement. Here, the contractual relationship must continue because of the

provision for compulsory arbitration of the provisions of the new agreement.

ANSWER TO PETITIONER'S BRIEF.

The Petitioner's Brief makes no mention of the issue over the inclusion of Vollan and Lucy except in a footnote on page 19. The cases therein listed support the doctrine that one person may prefer and file a charge for himself and other persons. However, these cases hold that notice of the inclusion of such other persons must be given to the Respondent. Here the Board has failed because at no time was the Respondent advised that it was *accused* of discriminating against Vollan and Lucy. We were entitled to a *Notice* and a *hearing*. We have had no *notice* and the *hearing* was not conducted on the basis that Vollan and Lucy were *charging individuals* as to whom Respondent must defend itself.

The record is excerpted in our Supplemental Statement.

Without admitting that the inclusion of Vollan and Lucy was vague and uncertain, yet assuming this in favor of the General Counsel, the case of Vollan and Lucy must fail. A vague statute would be stricken down under the due Process Clause of the Fifth Amendment.

Neither criminal nor civil penalties may constitutionally be imposed under a statute which does not define an offense with sufficient certainty to apprise the persons subject to it of the acts which they are

forbidden to perform. (*International Harvester Co. v. Kentucky* (1914), 234 U. S. 216, 223; *Small Co. v. Am. Sugar Ref. Co.* (1925), 267 U.S. 233, 239; *Cline v. Frink Dairy Co.* (1927), 274 U.S. 445, 465; *Champlin Ref. Co. v. Commission* (1931), 286 U.S. 210, 243.) Due process requires that individuals be informed beforehand that particular action is forbidden and will subject them to penalties or other sanctions before such penalties and sanctions may be imposed.

In *Lanzetta v. New Jersey* (1939), 306 U.S. 451, in holding that a criminal statute was void by reason of vagueness and uncertainty, the Supreme Court said (p. 453):

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v. Reese, 92 U. S. 214, 221; Czarra v. Board of Medical Supervisors, 25 App. D. C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368; Lovell v. Griffin, 303 U. S. 444. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Construction Co., 269 U. S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant

alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

CONCLUSION.

Respondent asserts the contract was not renewed or extended and was exempted under Section 102 of the Act.

We assert that Kangas was made a party to the proceeding before the Trial Examiner without proper *notice.*

We assert that Vollan and Lucy were not parties in the proceedings before the Trial Examiner and that Respondent has not been *accused* of any unfair labor practices as to them. Therefore, the Trial Examiner and the Board had no authority to include them for the purposes of relief.

Dated, Seattle, Washington,
March 14, 1952.

Respectfully submitted,
L. PRESLEY GILL,
Attorney for Respondent.

(Appendix Follows.)

Appendix.

In the United States Court of Appeals
For the Ninth Circuit

No. 13,139

National Labor Relations Board,
Petitioner,
vs.
International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL,
Respondent.

AMENDED ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL, respectfully answers the "Petition of the National Labor Relations Board for Enforcement of an Order of the National Labor Relations Board", as follows:

I.

That said Order is based on the Board's Findings of Fact, but the evidence was not substantial, nor did it preponderate in showing that the employer, Chas. R. Bower & Co. was engaged in interstate or foreign commerce or that the employer's operations substantially affected interstate commerce.

II.

That the said Order is based on a mistake of law in that the said Board did interpret the labor agreement between the Respondent and the employer as having been "renewed or extended subsequent" to the effective date of the National Labor Relations Act, as amended within the meaning of Section 102 of the Act.

III.

That the said Board committed prejudicial error in that its Trial Examiner Wilson received evidence of alleged discrimination against Vollan and Lucy as tending to prove or proving illegal discrimination against the persons named in the caption of this case. That the said Vollan and Lucy did not file any charge, nor was any complaint issued on their behalf. That the Board refused to strike such evidence and presumably considered it in the issuance of said Order.

IV.

That the Trial Examiner Wilson permitted amendment of the Consolidated Complaint over the objec-

tion of the Respondent, by adding the name of Uhro A. Kangas, by including his name in the title of the case and as a charging party. That the petitioner herein approved said amendments and entered its Cease and Desist Order, together with the requirement for payment of back wages for said individual.

V.

That the Trial Examiner and the said Board did include Alfred Vollan and LeRoy Lucy as parties to the proceeding without there having been any motion for said purposes and without any notice or hearing being accorded to the Respondent with respect to said persons. But, nevertheless, the Board issued its Cease and Desist Order and ordered the payment of back wages with respect to said individuals.

Wherefore, the Respondent having fully answered the Petition, prays that this Court dismiss the same, with costs to Respondent.

L. Presley Gill,
Attorney for Respondent.

Office and P. O. Address
2800 First Avenue
Seattle, Washington

United States of America,
State of Washington, County of King.—ss.

I, Thomas Roe, the President of the International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 7, AFL, being the Respondent in the above entitled case, do hereby make solemn oath that the statements contained in the within and foregoing Amended Answer, are true to the best of my knowledge, information and belief.

Thomas E. Roe, Jr.

Subscribed and sworn to before me this 29th day of February, 1952.

L. Presley Gill,
Notary Public in and for the State of Washington, residing at Seattle.

Filed March 7, 1952.
Paul P. O'Brien, Clerk.